



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Federal Data Corporation

File: B-236265.2

Date: January 25, 1990

DIGEST

Where awardee waits until after award to advise the government that certain of its proposed line items do not meet the technical specifications required by the solicitation, if agency reopens discussions to permit offeror to modify its proposal, it must conduct discussions with all offerors in the competitive range.

DECISION

Federal Data Corporation protests award of an indefinite quantity/indefinite delivery contract to General Dynamics Corporation under request for proposals (RFP) No. F19630-89-R-0001 issued by the Air Force Computer Acquisition Center for computer hardware, software, maintenance, training, and data to support the Strategic Air Command's Strategic War Planning Systems. Federal Data contends that General Dynamics' contract should be terminated and that negotiations should be reopened because General Dynamics failed to reveal, prior to award, that it knew its proposal included noncompliant hardware and because the Air Force is currently evaluating General Dynamics' proposed substitute hardware.

We sustain the protest.

The RFP required fixed prices for more than 260 contract line items plus monthly maintenance prices for existing equipment. Proposals were evaluated, in descending order of importance, in technical, management, and cost areas. Award was to be made, based upon an integrated assessment of proposals, to the offeror whose proposal was most advantageous to the government.

Three offerors, including Federal Data and General Dynamics, submitted proposals and, after initial technical evaluations, discussions were conducted with all offerors. Once all matters raised in discussions were addressed by the

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offerors, the Air Force requested the offerors to "acknowledge that all negotiation issues are closed," and that they were in agreement with their respective draft model contract and the government's cost reconciliation. After General Dynamics and the other offerors so acknowledged, best and final offers (BAFOs) were requested. This request advised each offeror that if its BAFO contained inadequately explained changes from its original proposal, such changes might affect the adequacy of the proposal and could render it unacceptable. It further advised that any technical revisions would not be subject to further discussions.

While conducting a "cost refinement" of its proposal in anticipation of submitting its BAFO, General Dynamics discovered that it had made an error in its technical proposal with regard to certain line items comprising a mass storage subsystem. As originally proposed by General Dynamics, its subsystem would meet the specifications, including a requirement for 100 gigabytes (Gbytes) of automatically accessible storage, through use of 2 optical jukeboxes, 4 optical disk drives, 40 optical disks, each with a capacity of 2.56 Gbytes, and a controller.^{1/} However, General Dynamics misinterpreted the manufacturer's technical literature regarding the capacity of the optical disks which General Dynamics had proposed. The literature in question indicated each "drive" had a 2.56 Gbytes capacity, which General Dynamics engineers interpreted to mean a 2.56 Gbyte disk media capacity. In actuality, each disk's capacity is only 1.28 Gbytes. This misinterpretation resulted in a proposal which offered only half the equipment necessary to meet those specifications. Apparently because of the ambiguity of the technical literature submitted with General Dynamics' proposal, the Air Force evaluators did not notice this error.

General Dynamics did not notify the Air Force of its error or revise its proposal to correct the error because it believed from its acknowledgment of the draft contract and the closure of discussions, as well as from the BAFO request letter, that the Air Force had instituted a technical and communication "freeze" preventing further revisions.

^{1/} Optical jukeboxes are so named because they resemble in function a phonograph record player jukebox. Optical disks are used for storage of information and information is retrieved by an automatic process which locates the proper disk, mounts it on a disk drive (if not already mounted), reads the information sought, and transfers it elsewhere in the system.

After evaluating the BAFOs, the Air Force awarded the contract to General Dynamics at a current dollar value of \$165,553,887. Federal Data was the second low offeror at \$574,201,366 in current dollar value. Federal Data then filed a protest with our Office alleging among other things that General Dynamics was nonresponsible and was attempting to "buy in" with a below cost offer.

During the development of that protest, General Dynamics notified the Air Force that it was unable to furnish the three storage subsystem line items contained on a delivery order issued with the contract award, because of its error regarding capacity. In a series of letters and meetings, General Dynamics explained its error and sought to substitute a different subsystem than that originally proposed, for the approximately 15 line items affected. The substitute solution was necessary, according to General Dynamics, because merely doubling the capacity of the original equipment would exceed the maximum size specifications set forth in the RFP.^{2/} The Air Force has not yet completed its evaluation of the substitute subsystem in part because the optical disk drives are produced by the Toshiba Corporation and, under applicable law and regulations, Toshiba products may only be used in limited circumstances. See Section 2443, Multilateral Export Control Enhancement Amendments Act, Pub. L. 100-418, 50 U.S.C.A. App. § 2410a (West Supp. 1989); Federal Acquisition Regulation § 52.225-12 and § 52.225-13 (FAC 84-46).

Upon learning of General Dynamics' proposed substitution and of the Air Force's ongoing evaluation, Federal Data withdrew its original protest and filed the instant protest. Federal Data now contends that negotiations should be reopened due to General Dynamics' misrepresentation in failing to disclose its error prior to submitting its BAFO, and due to the Air Force's post-award discussions with, and waiver of the delivery schedule for, General Dynamics. In particular, Federal Data argues that it was prejudiced, since in a subsequent round of discussions, it would have lowered its price and General Dynamics likely would have raised its price.

It is plain that General Dynamics submitted a proposal that failed to meet mandatory specifications of the RFP, that

^{2/} As the Air Force has continued its evaluation of the substitute subsystem, General Dynamics has continued to seek a solution using the originally proposed equipment in a smaller configuration.

acceptance of such a proposal is improper, and that the protracted discussions currently being conducted with General Dynamics are for the purpose of giving General Dynamics the opportunity to make its proposal acceptable. The conduct of discussions with one offeror requires that discussions be conducted with all offerors within the competitive range, including an opportunity to submit revised offers. 10 U.S.C. § 2305(b)(4) (1988); Motorola, Inc., B-225822, June 17, 1987, 87-1 CPD ¶ 604. This rule applies even where discussions are reopened after an initial selection is made, including where the post-selection negotiations do not directly affect the offerors' relative standing, because all offerors are entitled to equal treatment and an opportunity to revise their proposals. PRC Information Sciences Co., 56 Comp. Gen. 768, 77-2 CPD ¶ 11. Here, since the Air Force is conducting discussions with General Dynamics, it must also conduct discussions with any other offerors in the competitive range and allow them to revise their proposals if they so desire. Since the Air Force is conducting discussions only with General Dynamics, we sustain the protest.

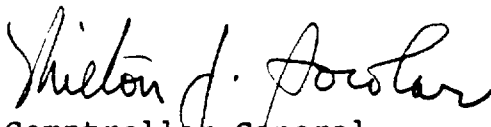
In reaching this conclusion, we recognize that the Air Force argues that its discussions with General Dynamics are a matter of contract administration and not for review by our Office. The Air Force is correct that normally we do not review matters of contract administration. See William B. Hackett & Assocs., Inc., B-232799, Jan. 18, 1989, 89-1 CPD ¶ 46. However, since the error in General Dynamics' proposal was known to it prior to submission of its BAFO, and the agency's post-award communications with General Dynamics concern its proposed approach for correcting the error and for meeting mandatory specifications, we believe what is occurring here is more appropriately viewed as reopened discussions with an offeror for the purpose of making its proposal acceptable, rather than as simply a matter of contract administration.

In light of our decision, we will not consider what prejudice may have accrued to Federal Data from the apparent waiver of the contract delivery schedule. We also will not consider the acceptability of General Dynamics' substitute subsystem containing Toshiba products. Since compliance with applicable law and regulations is a matter for the Air Force to consider in its evaluation of General Dynamics' proposal and it has not yet made that determination, our consideration of the issue would be premature.

We recommend that the Air Force reopen discussions with all offerors in the competitive range and obtain another round

of BAFOs. We also find that Federal Data is entitled to the costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1989).

The protest is sustained.

for 
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of the United States